IN THE COURT OF APPEALS OF THE STATE OF ALASKA

JIMMIE L. EACKER, Appellant, v. STATE OF ALASKA, Appellee.	Court of Appeals No. A-11313 Trial Court No. 3SW-07-338 CR MEMORANDUM OPINION No. 6289 — February 24, 2016

Appeal from the Superior Court, Third Judicial District, Seward, Anna M. Moran, Judge.

Appearances: Tracey Wollenberg, Assistant Public Defender, and Quinlan Steiner, Public Defender, Anchorage, for the Appellant. Paul J. Miovas Jr., Assistant District Attorney, Anchorage, and Michael C. Geraghty, Attorney General, Juneau, for the Appellee.

Before: Mannheimer, Chief Judge, Allard, Judge, and Suddock, Superior Court Judge.[*]

Judge MANNHEIMER.

In the early morning hours of March 6, 1982, Jimmie L. Eacker left a Seward bar in the company of a woman named T.L. T.L. was not seen again for several

[*] Sitting by assignment made pursuant to Article IV, Section 16 of the Alaska Constitution and Administrative Rule 24(d).

weeks — until April 17th, when her body was found in the woods by a search party. She had been stabbed 26 times with a screwdriver: seven wounds to her head and jaw, and nineteen wounds to her torso, including five that penetrated her heart. Her pants had been removed, and someone had had sexual intercourse with her shortly before her death.

Eacker offered various inconsistent accounts of what transpired between him and T.L., but he was not charged with any crime at that time.

Twenty-four years later, in 2006, the Seward Police Department re-opened the investigation by sending various items of evidence to the State Crime Lab for a more advanced DNA analysis. The Crime Lab determined that a blood stain on Eacker's pants came from T.L., and that sperm found in T.L.'s underwear came from Eacker.

In 2007, Eacker was indicted for first-degree murder in connection with T.L.'s death. Eacker was brought to trial in 2010, and he was convicted of first-degree murder, but the superior court granted Eacker a new trial after it was discovered that the State had withheld DNA evidence indicating that another man had sex with T.L. near the time of her death.

After the superior court granted the new trial, the State and Eacker reached a plea bargain. Under the terms of this agreement, Eacker pleaded guilty to the lesser offense of manslaughter, and he admitted aggravator AS 12.55.155(c)(4) (use of a dangerous instrument).

The superior court sentenced Eacker to 20 years' imprisonment with 2 years suspended (18 years to serve). Eacker now appeals that sentence.

The law that governed sentencing for manslaughter at the time of Eacker's offense (March 1982)

Eacker was a first felony offender for presumptive sentencing purposes, and manslaughter is a class A felony.[1] The maximum penalty for manslaughter is 20 years' imprisonment (and was the same in 1982).[2]

At the time of Eacker's offense (*i.e.*, in March 1982), first felony offenders convicted of manslaughter did not face a presumptive term of imprisonment.[3] Because there was no applicable presumptive term, Eacker's sentencing was governed by the rule announced by this Court in *Austin v. State*, 627 P.2d 657, 657-58 (Alaska App. 1981), and *Tazruk v. State*, 655 P.2d 788, 789 (Alaska App. 1982).

Under the *Austin-Tazruk* rule, when the sentencing statutes did not provide a presumptive term for a first felony offender, the presumptive term specified for a second felony offender convicted of the same offense acted as a ceiling on the defendant's sentence. The court could not sentence the defendant to a term of active imprisonment (*i.e.*, time to serve) equal to or greater than a second felony offender's presumptive term unless the court found (by clear and convincing evidence) that the defendant's case involved significant aggravating factors, or that extraordinary circumstances existed that would have justified sending the defendant's case to the

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[1] AS 11.41.120(b).

[2] Former AS 12.55.125(c) (pre-2005 version).

[3] Former AS 12.55.125(c)(1) (pre-2005 version).

statewide three-judge sentencing panel under AS 12.55.165-175 if presumptive sentencing had applied. [4]

At the time of Eacker's offense, the presumptive term for a second felony offender convicted of manslaughter was 10 years' imprisonment. [5] This, then, was the ceiling on Eacker's time to serve unless the sentencing court found substantial aggravating factors or extraordinary circumstances.

The superior court's sentencing analysis in Eacker's case, and Eacker's arguments as to why his sentence is excessive

The superior court acknowledged that the *Austin* limit in Eacker's case was 10 years' imprisonment, but the court concluded that Eacker's case presented extraordinary circumstances that justified a sentence above this 10-year ceiling.

In particular, the superior court concluded that Eacker's crime constituted a murder, not just a manslaughter:

> *The Court*: [This] Court heard several days of evidence [at Eacker's trial]. The Court, like the jury, is convinced beyond a reasonable doubt that Jimmie Eaker murdered [T.L.]. ...
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> [The] defendant was seen leaving with [T.L.] the night of her disappearance. He borrowed [his friends'] truck to give someone a ride home, but [he] refused to identify who [this person] was. [The] defendant returned the next morning

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[4] *See Surrells v. State*, 151 P.3d 483, 490 (Alaska App. 2006); *Brezenoff v. State*, 658 P.2d 1359, 1362 (Alaska App. 1983), as modified by *Buoy v. State*, 818 P.2d 1165, 1167-68 (Alaska App. 1991).

[5] Former AS 12.55.125(c)(3) (pre-2005 version).

> ... with [T.L.]'s blood on his clothes, and with his face and arms streaked with blood. ... [He] then made up a story about giving a ride to a black-haired lady and dropping her off at Bear Creek. He [asserted that] the blood on his face and clothing was the result of a scuffle he had with the boyfriend of the mysterious black-haired woman. ... He later admitted ... [that] he had gone to the dump, but [he] claimed [that] he went there to meditate.
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> Later, the defendant would admit [that] he made up the story about giving the dark-haired girl a ride, and about the fight that he had had with her boyfriend. ... He [then] claimed [that] he couldn't remember anything because he had blacked out. ...
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> [Eacker's intent to kill] can be inferred from the fact that [T.L.] was stabbed 26 times with a screwdriver and hit in the face with enough force to crack her jaw and dislodge her tooth. Although the defendant claimed he was too intoxicated and had taken mushrooms and blacked out, there was no objective evidence to support the defendant's self-serving statement. Even if the defendant's intent to [kill] was tempered by his intoxication, the above evidence was more than enough ... to show [that] the defendant engaged in conduct manifesting extreme indifference to the value of human life, and [this conduct] constitutes murder in the second degree.

(See *Benboe v. State*, 698 P.2d 1230, 1231 n. 2 (Alaska App. 1985), where this Court held that an offense qualifies as "among the most serious" for purposes of aggravator AS 12.55.155(c)(10) if the defendant's conduct factually constituted a higher degree of offense.)

In his brief to this Court, Eacker does not dispute the superior court's analysis of whether his conduct amounted to murder, but Eacker takes issue with the superior court's further statement that Eacker's assault on T.L. "border[ed] on torture".

Eacker points out that, according to the medical examiner's testimony, it appears that T.L. was not moving or resisting while Eacker was stabbing her in the chest — and that she was therefore probably already unconscious. Eacker argues that if T.L. was unconscious while she was being stabbed, then the superior court was wrong to say that T.L. suffered and that Eacker's conduct bordered on torture.

Because "torture" connotes an intentional infliction of pain or other distress, it is true that the record in this case may not support a finding of torture.[6] But the superior court was undoubtedly correct in singling out Eacker's conduct as an example of inexplicable and seemingly senseless brutality. And as this Court stated in *Hamilton v. State*, 59 P.3d 760, 772 (Alaska App. 2002), "we have repeatedly upheld sentences in the upper end of the penalty range for defendants who committed gratuitous or otherwise inexplicable acts of extreme violence."

Eacker also argues that, even if the facts of the homicide might support a lengthy term of imprisonment, the superior court failed to give sufficient weight to the evidence that Eacker had turned his life around since the mid-1990s — abstaining from drugs and alcohol, and committing no further felonies after his two 1991 convictions for attempted sexual abuse of a minor (for abusing two girls, ages 11 and 14).

The record of the superior court proceedings shows that the sentencing judge actively wrestled with the problem of finding an appropriate sentence for Eacker,

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[6] Compare the definition of "deliberate cruelty" for purposes of aggravator AS 12.55.155(c)(2): the infliction of "pain (whether physical, psychological, or emotional) gratuitously or as an end in itself, as opposed to pain that is ancillary to the commission of the crime." *Scholes v. State*, 274 P.3d 496, 498 (Alaska App. 2012).

given the brutality of the homicide but also given the changes that Eacker had apparently made in his life in the years following the homicide.

Eacker presented several witnesses at his sentencing hearing. A representative from the Department of Corrections testified that, with one exception (a disturbance involving an argument with another inmate), Eacker had been a law-abiding prisoner since his arrest in 2007. A fellow inmate testified that Eacker counseled him to stop using drugs, that Eacker gave him information regarding potential resources for treatment and support, and that Eacker had had similar conversations with other inmates. Other witnesses testified that Eacker had stopped drinking in the mid-1990s, and that (since that time) he was a trustworthy and diligent worker — someone who often did more than his share, and who could be trusted with money.

In addition, Eacker presented the testimony of Dr. Paul Turner, a clinical psychologist who was employed by Eacker's attorneys to evaluate Eacker in anticipation of sentencing. Based on the psychological tests that Dr. Turner administered to Eacker, and based on Eacker's personal history (especially the fact that Eacker's problems with drugs and alcohol were in remission), Dr. Turner concluded that Eacker's risk of future violence was low, as long as he did not return to using drugs or alcohol.

At the end of the first day of the sentencing hearing, the judge told the parties:

> *The Court*: This is a very complicated sentencing. It's complicated because we're sentencing the defendant for an act that occurred over 30 years ago, [and] trying to balance ... what has happened [with] the passage of time.
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> At first blush, it would seem reasonable that if the Court sentenced the defendant to 99 years after the first trial, [then] the Court would automatically sentence [him] to [the] maximum of 20 years [on] this [manslaughter] charge. [But]

> the Court cannot simply sentence the defendant to the maximum; [the Court] has to weigh the various *Chaney* [sentencing] factors, including community condemnation, rehabilitation, general deterrence, deterrence of himself, and deterrence of others.

The judge then recessed the proceedings so that she could consider the matter overnight. When court reconvened the next morning, the judge announced her sentencing decision.

The judge explained why she concluded that Eacker was a "worst offender" for purposes of a manslaughter conviction (an explanation we have already presented). The judge also conceded that Eacker's age (58 years old at the time of sentencing) and his poor health lessened the need to deter him, and lessened the need to isolate him to protect the public. And the judge declared that she was "surprised and gratified" to learn that Eacker had lived a sober and productive life for many years, and that he had been a role model and good friend to many people.

But the judge concluded that, even with these mitigating circumstances, the sentencing goals of general deterrence and community condemnation remained the primary considerations in fashioning Eacker's sentence:

> *The Court*: While the Court can consider [the] defendant's apparent rehabilitation as a factor in sentencing, the *Chaney* factors of general deterrence and community condemnation and reaffirmation of societal goals are the more important [sentencing] goals in a case such as this, where a woman was brutally stabbed and murdered.
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> . . .
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> [T.L.] ... was stabbed 26 times by a person she thought was her friend. The death of another by murderous means is not tolerated in our society, no matter how old or sick or ... rehabilitated a person may have become [later]. This was a brutal murder. Community condemnation and reaffirmation

> of societal goals are paramount in this type of case. Others should know that taking another person's life in this manner will not be tolerated.

The judge then imposed a sentence of 20 years' imprisonment, but she suspended 2 years of this sentence "because [the] defendant has proven [that] he poses little risk of harm to others, and because he appears to have been rehabilitated".

As our supreme court explained in *Asitonia v. State*, 508 P.2d 1023, 1026 (Alaska 1973), the sentencing judge bears primary responsibility for determining the priority and relationship of the various sentencing goals under the facts of any given case.[7] Given the seriousness and brutality of the homicide in this case, we can not say that the sentencing judge was clearly mistaken when she concluded that the goals of general deterrence and community condemnation outweighed Eacker's rehabilitative efforts and his apparently clean record during the fifteen-plus years preceding his sentencing.

Eacker's challenge to the special condition of his probation relating to medical treatment

The superior court's written judgement in Eacker's case contains two special conditions of probation (conditions 1 and 9) that include clauses which purport to give Eacker's probation officer the authority to direct or approve Eacker's medical treatment. Eacker contends that these clauses amount to an unconstitutional infringement on his relationship with his medical providers.

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[7] *See also*, *e.g.*, *Pickard v. State*, 965 P.2d 755, 760 (Alaska App. 1998).

The State concedes that these clauses are invalid, given the facts of Eacker's case. We concur. [8] We therefore direct the superior court to revise its written judgement by deleting the challenged clauses of special conditions 1 and 9.

Eacker's challenge to the content of the pre-sentence report

Prior to his first sentencing in this case, Eacker objected to various adverse assertions in the pre-sentence report. The State agreed that these assertions should be deleted from the report. But the court, instead of completely redacting the challenged assertions, simply drew a line through them — leaving them easily legible.

This was error. Under these circumstances, Alaska Criminal Rule 32.1(f)(5) requires the sentencing judge to completely redact the challenged assertions, and to label the redacted version of the pre-sentence report the "approved" version. [9]

The State concedes that the superior court's handling of this matter did not conform to the requirements of Rule 32.1(f)(5). We therefore direct the superior court to prepare (or order the preparation of) a corrected pre-sentence report.

Conclusion

We AFFIRM the judgement of the superior court, with the exception that special conditions of probation 1 and 9 must be amended as described in this opinion. We also direct the superior court to prepare a corrected pre-sentence report, with the challenged assertions redacted.

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[8] *See Marks v. State*, 496 P.2d 66, 67-68 (Alaska 1972) (requiring an appellate court to independently assess any concession of error by the State in a criminal case).

[9] *See*, *e.g.*, *Vlak v. State*, 238 P.3d 1254, 1258 (Alaska App. 2010).